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Supreme Court of the United States

October Term, 1948.

No. 813

HENRY PLOUGH,
Petitioner,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

No. 814

MARJORIE A. HANSON, as Administratrix of the Estate of GORDON M. HANSON, Deceased,
Petitioner,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

No. 815

ELMER VAN SLYKE,
Petitioner,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

No. 816

CAROLINE LYNCH, as Administratrix of the Estate of MYRON GEORGE LYNCH, Deceased,
Petitioner,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

ANSWERS TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF ANSWERS.

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To the Hon. Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your respondent, for its answer to the petition for writs of certiorari, respectfully shows:

Statement.

The above actions involve a grade crossing collision between a train and a truck. They have been tried twice. The first trial resulted in verdicts of no cause of action (Fol. 6, p. 2). On that trial the presiding judge correctly charged the law of New York regarding the defendant's duty at grade crossings. On the second trial no new witnesses were called by either party, and the testimony of each witness was substantially the same as that which he had previously given (See record on first appeal). However, the judge who presided at that trial gave, over the defendant's exception, an erroneous charge on the applicable New York law (Fols. 882, 883, 887, 888, 890, 891, pp. 294-297). This trial resulted in judgments totaling $112,139.61 (Fol. 11, p. 4). The Court of Appeals for the Second Circuit, recognizing the obvious prejudice resulting from this erreoneous charge, reversed the judgments of the District Court and directed a new trial (pp. 317-25).

The error above referred to related to the speed of defendant's train. It is the law of New York (and petitioners do not here contend otherwise) that if a train properly signals its approach to a country crossing, no negligence can be predicated upon the rate of speed at which it approaches. The District Court charged, however, that if the speed of defendant's train was excessive or dangerous to the users of the highway and if it exceeded the speed that reasonably prudent persons would have maintained under like circumstances, that would amount to negligence on the part of the railroad. Defendant's exception to such portion of the charge having saved this question for review, the Circuit Court held that the charge was contrary to the

law of New York and that the defendant was entitled to a new trial in which the applicable law would be clearly and correctly stated (pp. 320-321).

These are typical grade crossing collision cases. No unusual facts are involved. The plaintiffs or their decedents, riding in a truck owned by their employer Iroquois Gas Corporation, were struck by one of defendant's trains traveling at a speed estimated by different witnesses to be anywhere from 35 to 70 miles per hour (Fols. 467, 548, 623, pp. 156, 183, 208). The plaintiffs Plough and Van Slyke testified that they heard no whistle, and they called three of the train's passengers, who likewise testified that they did not hear the whistle blow (Fols. 309, 391, 435, 467, 480, pp. 103, 131, 145, 156, 160). Defendant on the other hand produced evidence as to whistling which on the first appeal Judge Swan of the Circuit Court described as "overwhelming". The defendant called three disinterested witnesses in addition to its train crew who testified emphatically that the whistle blew from up beyond the whistling post a quarter of a mile away until just before the crash, when, according to the testimony of the fireman, the engineer released the whistle handle to apply the emergency brake (Fols. 771, 772, 809, 820, 821, 826, 827, 831, 834, 848, 849, 850, 855, 856, 553, 570, 571, 572, 573, 610, 611, 612, 630, 657, 658, 872, pp. 257, 258, 270, 274, 276, 277, 278, 283, 284, 285, 286, 185, 190, 191, 204, 210, 219, 220, 291).

One of these was Mr. William Kessler a farmer who resided a short distance from the crossing. Mr. Kessler was harnessing a team of horses in his yard at the time the accident occurred. He testified on the second trial, as he did on the first, that he heard the train whistle for the crossing and, looking up, observed that it was coming round the curve where the whistling post was located; that he turned

back to his work, heard a number of blasts and then the crash (Fols. 771, 772, 826, pp. 257, 258, 276). He also testified that the interval between the last whistle and the crash was not more than a second or two (Fols. 820, 821, p. 274).

Edna Kessler, the daughter of Mr. Kessler, was in the outhouse at the time of the collision (Fol. 830, p. 277). She testified that she heard "several prolonged blasts" and immediately thereafter the crash (Fols. 831, 848, pp. 277, 283).

Milford Crandall, a young man who worked on the Kessler farm, was standing with Mr. Kessler when the accident occurred. He testified that he heard the train whistle and, looking up, observed that the train was near the whistling post, approximately a quarter of a mile from the crossing. He then heard several whistles from the train and then the crash (Fols. 855, 856, pp. 285, 286).

The testimony of the above witnesses did not change between the first and second trials. The charge of the Court did—and erroneously so. Such error, the Circuit Court properly felt, was prejudicial and required a new trial.

ARGUMENT.

POINT I.

The District Court erred in its charge to the jury, and reversal upon this ground by the Circuit Court was proper.

Without question, it is the law of New York that if a train properly signals its approach to a country crossing, no negligence can be predicated upon the rate of speed at which it approaches. The following cases do not begin to exhaust the authorities which support this proposition:

Warner vs. N. Y. C. R. R. Co., 44 N. Y., 465, 469.

"The law places no restrictions upon the rate of speed at which the trains may be run across the country at the crossings of the Highways or elsewhere; nor is the train required to stop or reduce the speed at such places. Nor does the law subject the railroad company to liability for damages occurring from the rate of speed, if the signals required by law are observed."

Hunt vs. Fitchburg R. R. Co., 22 A. D., 212, 213 (3rd Dept.).

"If the warning given is timely and reasonable, the company is not negligent, no matter how rapidly the train may be run."

Phelps vs. Erie R. R. Co., 134 A. D. 729, 731 (3rd Dept.).

"The speed of a train over an ordinary highway crossing in the open country, be it ever so great, is not of itself a negligent act."

McKelvey vs. D. L. & W. R. R. Co., 253 A. D. 109, 110 (4th Dept.).

"Defendant had a paramount right of way at this crossing. There being no ordinance regulating speed at this point, the defendant had the right to propel its trains over the highway at any rate of speed it chose, provided it gave due and timely warning of their approach."

Lee vs. Pennsylvania R. R. Co., 244 A. D. 558, 562 (4th Dept.) Reversed on other grounds, 269 N. Y. 53.

"The crossing was in the open country, and in a sparsely settled portion of the community. The law places no restriction upon the speed at which the defendant may operate its cars at this point, and the fact that the train was going 60 miles an hour did not charge the defendant with negligence provided due and timely warning of the approach of the train was given."

Goodrich vs. Erie R. R. Co., 183 A. D., 189, 190 (3rd Dept.).

"The defendant was not negligent in running its train over the crossing at a rate of speed better than 50 miles an hour."

Young vs. Erie R. R. Co., 158 A. D., 14 (4th Dept.).
Orafina vs. N. Y. State Rys., 148 A. D. 417 (4th Dept.).

In exact contradiction to the rule of law laid down in the above cases, the Trial Court herein charged that if the speed of defendant's train was excessive or dangerous to the users of the highway and if it exceeded the speed that reasonably prudent persons would have maintained under like circumstances, that would amount to negligence on the part of the railroad. The Court's entire charge on the question of speed was as follows (Fols. 882, 883, 887, 888, 890, 891, pp. 294-297):

"The evidence introduced by the plaintiffs for the purpose of establishing negligence on the part of the railroad related to the question of whether an adequate and timely signal of the train's approach to the crossing had been given by the engineer, and to the question whether the speed of the train as it approached the crossing was excessive or dangerous in view of all the circumstances. * * *

By the circumstances, I mean all the testimony bearing upon the topography of the highway and of the railroad, the angle at which the railroad tracks cross the highway, the view that was obtainable by users of the highway as they approached the crossing, and all the other evidence which touched upon the occurrence involved. * * *

The other question relating to the alleged negligence upon the part of the railroad was with reference to the speed at which the train approached this crossing. There is no speed limit prescribed by law. There is some evidence that the railroad had a rule which prescribed a speed limit of 45 miles an hour. Rules, such as these, are made by the railroad to govern its employees. Whatever the rule was regarding the speed that was prescribed by the railroad, that is not the

test of whether the railroad was negligent in regard to speed. It might be negligent under certain circumstances if the train was going at a lesser speed than prescribed by the railroad, and under certain other circumstances it would not be negligence to even exceed the speed prescribed by the railroad. The test here again in regard to whether the speed of this train amounted to negligence on the part of the railroad is whether the operation of the train under these circumstances was reasonable and whether it amounted to the exercise of reasonable care and caution under all the circumstances. * * *

If upon a consideration of all the evidence you conclude that this train was being operated under these particular circumstances, and that the speed was excessive or dangerous to the users of the highway, and that it exceeded the speed that reasonably prudent persons would have maintained under like circumstances, then that would amount to negligence upon the part of the railroad."

This charge which was so opposed to the well settled law of New York and which so vitally affected the merits of the plaintiffs' claim could not help but operate to the defendant's prejudice; and defendant's counsel duly noted his exception thereto (Fol. 919, p. 307).

In *Hunt v. Fitchburg R. R. Co., supra*, the Trial Court's charge on the subject of speed read as follows:

"I charge you, as matter of law, that the defendant in the operation of its trains upon that road in the open country was not bound to run at any rate of speed. It could operate its trains at a rate of speed as pleased it, but in approaching a crossing it was bound to exercise proper care, reasonable care, and that reasonable care which it must exercise in approaching a crossing depends, so far as its speed is concerned, upon all the surroundings, the nature and circumstances, and condition of the crossing, and whether or not it is a highway upon which there is little travel, or upon which there is a great deal of travel; whether or not the view is obstructed of an approaching train, or whether it

can be clearly seen. Various facts and circumstances may exist, and do exist, upon which that question of the negligence of the defendant in the operation of its trains rests. So that it is a question for you as to what rate of speed that train was running. * * * What does the evidence satisfy you with regard to the rate of speed of that train upon that occasion, when approaching this crossing, and in view of all the circumstances surrounding that crossing, in view of its condition as you find it from the evidence to be; was the train upon this occasion running at a dangerous rate of speed, so that you can say as a question of fact it was negligence?"

A comparison of that charge with the Trial Court's charge in the instant cases shows the following amazing similarity between them:

Hunt Case.	*Our Case.*
"It could operate its trains at a rate of speed as pleased it * * *."	"There is no speed limit prescribed by law." (Fol. 887, p. 296).
" * * * in approaching a crossing it was bound to exercise proper care, reasonable care, and that reasonable care which it must exercise in approaching a crossing depends, so far as its speed is concerned, upon all the surroundings, the nature and circumstances, and condition of the crossing, and whether or not it is a highway upon which there is little travel, or upon which there is a great deal of travel; whether or not the view is obstructed of an approaching train, or whether it can be clearly seen."	"The test here again in regard to whether the speed of this train amounted to negligence on the part of the railroad is whether the operation of the train under these circumstances was reasonable and whether it amounted to the exercise of reasonable care and caution under all the circumstances" (Fol. 888, p. 296). "By the circumstances, I mean all the testimony bearing upon the topography of the highway and of the railroad, the angle at which the railroad tracks crossed the highway, the view that was obtainable by users of the

highway as they approached the crossing, and all the other evidence which touched upon the occurrence involved." (Fol. 883, p. 295).

"What does the evidence satisfy you with regard to the rate of speed of that train upon that occasion, when approaching this crossing, and in view of all the circumstances surrounding that crossing, in view of its condition as you find it from the evidence to be; was the train upon this occasion running at a dangerous rate of speed, so that you can say as a question of fact it was negligence?"

"If upon a consideration of all the evidence you conclude that this train was being operated under these particular circumstances, and that the speed was excessive or dangerous to the users of the highway, and that it exceeded the speed that reasonably prudent persons would have maintained under like circumstances, then that would amount to negligence upon the part of the railroad." (Fols. 890, 891, p. 297).

The Appellate Division reversed a judgment for the plaintiff in the *Hunt* case solely because of the above charge. The Court said (p. 214):

> "Although it told the jury that the defendant was at liberty to operate its trains at any rate of speed it pleased, yet it at the same time instructed them that it must approach the crossing with reasonable care, and that so far as speed is concerned, reasonable care would depend very largely upon the condition of the crossing and the circumstances surrounding it. It does not call their attention at all to the fact that if the signals of approach are timely and adequate to the rate of speed used, then the very highest rate of speed would be consistent with reasonable care."

No statement could more aptly summarize the prejudicial error in the charge below, and the Circuit Court was obviously very much in accord with the New York Appellate Division when it directed a new trial.

POINT II.

The error in the Trial Court's charge was not overcome by the answers to the special interrogatories.

The Trial Court submitted two specific questions to the jury on the subject of negligence, one dealing with the speed of the train and the other with the adequacy of the warning (Fols. 925-927, p. 309). Petitioners' attempt to completely separate these two issues by contending that so long as the jury found that the warning was inadequate, the fact that they were erroneously charged on the question of speed did not harm the defendant.

The fallacy of such contention was immediately recognized by the Circuit Court. As Judge Chase pointed out, the adequacy of the warning given had to be determined not only as it related to the speed of the train, but also as it related to the propriety of such speed, i. e., whether the train was approaching the crossing at a speed greater than that at which a reasonably prudent person driving along the highway, as were the plaintiffs, would have expected it to approach. The Court felt that if the jury started its consideration of whistling with the premise that the defendant's train was going at an improper and negligent rate of speed, as they were permitted to do under the Trial Court's erroneous charge, they were bound to require a higher degree of care on its part than they would have if they started with the premise that the rate of speed was not improper.

The logic of the Circuit Court's reasoning is irrefutable. Two automobiles may be traveling fifty miles per hour, one on a country highway where the speed limit is fifty miles per hour and the other on a city street where the speed limit is twenty miles per hour. If a rule as to adequate warning

were to be applied to these two vehicles, is there any reasonable person who would not place a higher standard of care on the latter than on the former? Yet they are both going fifty miles per hour. So also in the instant cases, if the jury determined under the Trial Court's erroneous charge that defendant's train should only have been going twenty miles per hour and that it was actually going fifty, they could not help but require a higher degree of care with respect to warning signals than they would have, had they been correctly instructed that speed in and of itself is not negligence. It was not then a question of how much warning a train going at a speed of fifty miles per hour should have given; it was a question of how much warning a train going at an *improper* and *negligent* speed of fifty miles per hour should have given. No reasonable juror would apply the same standard of care in both cases.

If the Trial Court had charged the jury that as a matter of law the defendant's train was traveling at an excessive and dangerous rate of speed, could there be any argument but that this would have affected their determination of the question of the adequacy of the whistling? Here the jury found on the basis of the Court's erroneous charge that the train was traveling at an excessive and dangerous rate of speed. Could this erroneous finding have any less effect on their determination of the other question? Obviously not. The questions are interrelated, and the Trial Court's error affected them both. As stated by Judge Chase (Fol. 323, p. 320):

> "The natural reaction of the members of the jury would be to attempt to set as to signals some standard for a railroad operating a train negligently in respect to speed which would protect those crossing its track on the highway in spite of the 'excessive and dangerous' speed at which the train was being run."

In order for a general verdict to be sustained by written interrogatories under Rule 49(b) of the Federal Rules of Civil Procedure, at least one of the specific issues presented to the jury must be untainted by erroneous instructions. If the error in the Court's charge affects all the specific interrogatories, as it does in this case, there is no fair and proper finding of negligence upon which a general verdict can be based. There can be no rule of law, federal or state, which holds to the contrary. The Circuit Court properly decided that the defendant was entitled to a new trial in which the jury might determine the issues of negligence under correct instructions from the Trial Court. There is nothing in that ruling which requires a review by this Court. It is respectfully submitted, therefore, that these petitions for writs of certiorari should be denied.

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